

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MEMORY FILM PRODUCTIONS, *et al.*,

Plaintiffs,

-against-

PETER MAKARA, *et al.*,

Defendants.

ORDER

05-CV-3735 (BMC)(KAM)

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MATSUMOTO, United States Magistrate Judge:

Plaintiffs and counterclaim defendants Miletic, Mosaic, Lituchy, Friendly, Jenkins, Krainovich, Markowitz, Elich, Vukcevic, D'Angelo, Nestorovic, Memory Film Productions, Inc. and Jasenovac Research Institute (the "represented counterclaim defendants") have submitted a letter (docket no. 246) dated April 20, 2007, in response to the court's April 11, 2007 order, which directed that they provide factual and legal support for their request that defendant Wanda Schindley's depositions of plaintiffs/counterclaim defendants Aleksandar Mosaic and Antun Miletic, both of whom reside in Belgrade, Serbia, proceed by telephone, rather than via an in-person deposition in Belgrade, as Schindley has requested. In their letter, and in a follow-up letter dated April 26, 2007 (docket no. 252), the plaintiffs and the represented counterclaim defendants also responded to that portion of the court's April 11, 2007 order directing that they

provide information regarding the availability of counterclaim defendants Vlado Vukcevic and Velimir Nestorovic for deposition.

Having reviewed the parties' submissions with regard to these issues (docket nos. 233, 234, 237, 238, 246, 252, and 262), the court orders that Schindley may conduct in-person depositions of Masic and Miletic in Belgrade, and that Schindley and counsel for Nestorovic shall work together to schedule the deposition of Nestorovic while he and Schindley are in Belgrade.

The Depositions of Masic and Miletic

With regard to the depositions of Masic and Miletic, the court in its April 11, 2007 order directed counsel for plaintiffs and the represented counterclaim defendants to submit a letter addressing: (a) the legal basis for precluding Ms. Schindley from taking the depositions of plaintiffs Masic and Miletic in Belgrade, and for limiting Ms. Schindley to taking their depositions by telephone; (b) sworn or affirmed, translated medical records and/or reports by Masic's and Miletic's treating physicians explaining whether and to what extent they are medically unable to participate in an in-person deposition in Belgrade, and the medical reasons why a telephone deposition is preferable to an in-person deposition; and (c) complete copies of Masic's and Miletic's passports demonstrating that they have not traveled abroad in the recent past.

In their April 20, 2007 letter to the court, plaintiffs and the represented counterclaim defendants included no medical documentation, but instead submitted an affidavit by counterclaim defendant Barry Lituchy addressing the health of Masic and Miletic, based on his telephone conversations with Masic. According to Lituchy, Masic is 88 years old, is in critically poor health, and was confined to bed for the last two weeks under a doctor's care, although he has traveled to Vienna in the last twelve months. The condition for which Masic was confined to bed is unspecified and undocumented. (Docket no. 246, Lituchy Aff. ¶¶ 2, 3.) Lituchy states that Miletic is in his late 70s, has not travelled outside Serbia in the last twelve months, and that Masic told Lituchy that Miletic was about to undergo knee surgery. (Id. ¶¶ 4, 5.) To date, counsel for plaintiffs and the represented counterclaim defendants has provided neither medical documentation nor copies of Masic's and Miletic's passports to verify these claims.

Plaintiffs and the represented counterclaim defendants point to precedent within the Second Circuit favoring telephone depositions in certain circumstances. However, the cited cases all involve two factual scenarios inapplicable to the instant case. The first scenario concerns requests by the party *seeking the deposition* to do so by telephone. Fireman's Fund Ins. Co. v. Zoufaly, 93 Civ. 1890, 1994 U.S. Dist. LEXIS 15055 (S.D.N.Y. Oct.

21, 1994)(allowing plaintiff to conduct telephone deposition of non-party witness residing in California); Advani Enters., Inc. v. Underwriters at Lloyds, 95 Civ. 4864, 2002 U.S. Dist. LEXIS 15421 (S.D.N.Y. Oct. 18, 2000) (allowing plaintiff to take telephone depositions of two non-party witnesses residing in Egypt); see also Local Civil Rule 30.3 of the Eastern District of New York ("The motion of a party to take the deposition of an adverse party by telephone will presumptively be granted.") (emphasis added). In such cases, courts have noted that Rule 30(b)(7) of the Federal Rules of Civil Procedure authorizes courts to permit telephone depositions, and that permission to take a deposition by telephone "should be granted unless an objecting party will likely be prejudiced or the method employed would not reasonably ensure accuracy and trustworthiness." Fireman's Fund Ins. Co., 1994 U.S. Dist. LEXIS 15055, at *1 (quotations and citations omitted).

The second scenario concerns requests *by the deponent* to be deposed by telephone, where the alternative to a telephone deposition is for the deponent to travel to the United States to be deposed within the district in which the action was filed. In such cases, some courts have allowed the plaintiff-deponent to be deposed by telephone, while others have required the plaintiff-deponent to travel to the district in which the plaintiff commenced the action to be deposed. Compare Normande v. Grippo,

01 Civ. 7441, 2002 U.S. Dist. LEXIS 501 (S.D.N.Y. Jan. 16, 2002) (allowing *pro se* plaintiff, a resident of Brazil, to be deposed by telephone rather than incur expense of flying to New York for deposition) with Clem v. Allied Van Lines, Int'l Corp., 102 F.R.D. 938, 940 (S.D.N.Y. 1984) (" . . . this Court has long enunciated the policy of requiring a non-resident plaintiff who chooses this district as his forum to appear for deposition in this forum absent compelling circumstances"); AIA Holdings, S.A. v. Lehman Bros., Inc., 97 Civ. 4978, 2002 U.S. Dist. LEXIS 9218 (S.D.N.Y. May 20, 2002) ("Since the plaintiff chooses the forum in which an action is brought, it is well settled that a plaintiff is ordinarily required to make him or herself available for a deposition in the jurisdiction in which the action is brought.").

Neither factual scenario supporting a telephone deposition is present here, where defendant Schindley, the party seeking the deposition of Mosaic and Miletic, wishes to take and videotape their depositions in-person in Belgrade at her expense, rather than requiring Mosaic and Miletic, who are plaintiffs and counterclaim defendants in this action, to travel to the United States for deposition. Unlike the factual scenarios in Clem and AIA Holdings, Schindley is not demanding that Mosaic and Miletic appear for deposition in New York. Thus, even assuming the truth of the unsupported, hearsay statements regarding Mosaic's and

Miletic's age and ill health, they will not suffer any greater hardship by having to appear for a deposition in their home city rather than participate in their depositions by telephone. Indeed, Schindley has offered to take their depositions in their homes if necessary.

As one commentator has noted, "The determination of a telephone deposition's sufficiency should ordinarily be left to the judgment of the deposing party." 7 James Wm. Moore et al., Moore's Federal Practice ¶ 30.24[1] (3d ed. 2005). Here, Schindley has asserted that an in-person deposition is preferable, because it will be both easier and less expensive to find and hire an official court interpreter in Serbia than in the United States. (Docket no. 262, 4/23/07 Letter by Wanda Schindley, ¶¶ 8-9.) The court finds that an in-person deposition is also preferable in terms of ensuring the accuracy of the depositions and interpretations, and avoiding the prejudice and expenses Schindley would face were she required to conduct the depositions of Mosaic and Miletic by telephone, across continents and time zones. Mosaic and Miletic have provided neither factual nor legal justification for limiting Schindley to taking their depositions by telephone. Accordingly, the court orders that Mosaic and Miletic be deposed in Belgrade at a location convenient to them. In addition, because of the need for language interpretation during their depositions, Mosaic and Miletic may be

deposed for up to two hours each.

The Depositions of Vukcevic and Nestorovic

Plaintiffs and the represented counterclaim defendants state in their submissions that Vukcevic was made available for telephone deposition on April 27, 2007, but that Nestorovic will be in Serbia during May and will return to New York "sometime in May." (Docket no. 252, 4/26/07 Letter by Marshall Bellovin, Esq., at 2; Lituchy Aff. ¶ 7.) The court directs Schindley and counsel for Nestorovic to work together to schedule a date on which Nestorovic may be deposed while he and defendant Schindley are in Belgrade.

Schindley shall conduct the depositions of Masic, Miletic and Nestorovic pursuant to Rule 28(b) of the Federal Rules of Civil Procedure, which states that depositions may be taken in a foreign country "on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States."

SO ORDERED.

/s/
KIYO A. MATSUMOTO
United States Magistrate Judge
Eastern District of New York